APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 94-1011
(CA-93-1278-6-3)

In Re: GENERAL MOTORS CORPORATION,
a Delaware Corporation.

Petitioner.

ORDER

We have examined the petitioner's January 18, 1994, motion before the district court which represents, inter alia, an order recusing the Honorable G. Ross Anderson, Jr., from further participation in this case. The claims made by the petitioner in its motion and accompanying memorandum, if true, are extremely serious. A recusal order might affect significantly issues in our pending consideration of the petition for mandamus review of the district court's discovery orders. Consequently, we partially lift our stay of all proceedings in the district court solely to allow the district court to hear and rule upon the issue of recusal. The stay of all other proceedings in the district court remains in effect. The district court shall hear and rule upon the issue of recusal by February

28, 1994, and forthwith thereafter, forward to this Court a copy of its order.

Further, the portion of our stay that remains in effect is hereby extended until such time as we have ruled on the pending petition for mandamus review. The hearing scheduled for February 25, 1994, is continued and will be rescheduled for a date subsequent to the district court's ruling on recusal.

Entered this 18th day of February, 1994, at the direction of Judge Russell, Judge Hamilton, and Judge Williams.

/s/ Donald Russell
Circuit Judge

/s/ Clyde H. Hamilton
Circuit Judge

/s/ Karen J. Williams
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Mark D. CAMERON, Plaintiff,

vs.

GENERAL MOTORS CORPORATION, a Delaware Corporation, Defendant.
C/A No. 6:93-1278-3

Steven W. CAMERON, Plaintiff,

vs.

GENERAL MOTORS CORPORATION, a Delaware Corporation, Defendant.
C/A No. 6:93-1279-3

Laurie CAMERON, Plaintiff,

vs.

GENERAL MOTORS CORPORATION, a Delaware Corporation, Defendant.
C/A No. 6:93-1279-3

ORDER

GEORGE ROSS ANDERSON, Jr., District Judge

These matters are before the Court on the Defendant's Motion to Recuse and to Vacate the Orders resulting from hearings on December 10, 17 and 21, 1993. The Defendant has moved for recusal under 28 U.S.C. § 144 and 28 U.S.C. § 455(a).

This case has been primarily a discovery war of unprecedented magnitude laced with acrimony bordering on open hostility between the disputatious attorneys. To appreciate the extent of the tortured history, there have been a total of sixty-nine (69) motions filed.[1] One of the hearings on production consisted of twenty-seven (27) file boxes of documents. The Court was prepared to spend Christmas holidays going through these documents, but was saved this task when Plaintiffs' attorneys voluntarily admitted their errors and sent the Defendant's attorneys a check for Fifty-three Thousand and No/100 ($53,000.00) Dollars in accordance with the Court's previous Order for Sanctions.

Hardly a document has been produced without claim of privilege. Literally thousands of documents have been reviewed which has necessitated time consuming court hearings and countless hours of document examination by the Court. Paper accumulated to date fills three (3) cabinet drawers in my Chambers, yet discovery is still in its infancy. Both parties have been repeatedly warned against filing frivolous discovery motions. The Defendants have been non-responsive and evasive in practically all discovery requests.

I. DEFENDANT'S MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 144.

FINDINGS OF FACT

Section 144 is entitled "Bias or Prejudice of Judge" and requires recusal by a district judge when a legally sufficient and timely affidavit of bias is filed by a party accompanied by a Certificate of Good Faith of Counsel. The full text of this statute is as follows: Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit

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[1] Twenty-one (21) in C/A 6:93-1278-3; Thirty (30) in C/A 6:93-1279-3; and eighteen (18) in C/A 6:93-1280-3.

that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. 28 U.S.C. § 144.

An analysis of the technical requirements of 28 U.S.C. § 144 reveals that the following are mandated: (1) An affidavit; (2) By a party; (3) Timely filed; (4) That is legally sufficient; (5) Which states that a judge before whom the action is pending has a personal bias or prejudice; (6) Against the party or in favor of an adverse party (arising from an extrajudicial source); and

The affidavit must: (7) State the facts and reasons for the affiant's belief that personal bias or prejudice exists; (8) "A party may file only one such affidavit in any case;" and (9) "It", i.e., the affidavit of the party, (10) "Shall be accompanied by a Certificate of Counsel of Record stating that it is made in good faith."

"A judge against whom an affidavit under § 144 is filed must pass upon the legal sufficiency of the facts alleged. *Simmons v. United States*, 302 F.2d 71, 75 (3rd Cir. 1962).

It is equally the duty of a judge, however, to deny the relief claimed on account of the facts stated in the affidavit if they are legally insufficient, as it is to grant relief if they are sufficient. *Id.*" *Sine v. Local No. 992 International Brotherhood of Teamsters*, 882 F.2d 913, 914 (4th Cir. 1989); *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987); *Brody v. President & Fellows of Harvard College*, 664 F.2d 10, 12 (1st Cir. 1981), *cert. denied*, 455 U.S. 1027, 102 S.Ct. 1731, 72 L.Ed.2d 148 (1982); *United States v. Haldeman*, 559 F.2d 31,

139 n. 360 (D.C.Cir. 1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977); *Simmons v. United States*, *supra*. Far from being "virtually automatic" as the Defendant would have the Court believe, the Court is under a duty to pass upon the legal sufficiency of the affidavit filed. Failure to do so is error. *Sine v. International Brotherhood*, *supra*, at 914.

Under section 144, a judge is presumed to be qualified to hear the case, and there is a substantial burden on the moving party to demonstrate otherwise. *In re Union Leader*, 292 F.2d 381, 388 (1st Cir.), *cert. denied*, 368 U.S. 927, 82 S.Ct. 361, 7 L.Ed.2d 190 (1961); *Hinman v. Rogers*, *supra*, at 939.

The requirements of the statute must be strictly adhered to, and failure to meet those requirements is absolute grounds for denial of the motion. *United States v. Anderson*, 433 F.2d 856, 859 (8th Cir. 1970).

Under 28 U.S.C. § 144, the only claim of bias to be considered is that against a party. *United States v. Burt*, 765 F.2d 1364, 1368 (9th Cir. 1985); *Gilbert v. City of Little Rock, Arkansas*, 722 F.2d 1390, 1398 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 2347, 466 U.S. 972, 80 L.Ed.2d 820 (1983).

1. AN AFFIDAVIT BY A PARTY:

"Affidavits filed under § 144 are strictly scrutinized for form and timeliness, *United States v. Womack*, 454 F.2d 1337, 1341 (5th Cir. 1972), *cert. denied*, 414 U.S. 1025, 94 S.Ct. 450, 38 L.Ed.2d 316 (1973), and, therefore, before reaching the merits of the recusal motion, it is necessary to determine whether these procedural requirements have been met." *Lamborn v. Dittmer*, 726 F.Supp. 510, 514 (S.D.N.Y. 1989).

The Motion to Recuse and Vacate Orders was filed by the Defendant on January 18, 1994.

Section 144 expressly requires the "party" to make and file a legally sufficient affidavit asserting that the judge before whom the matter is pending has a personal bias against him or

in favor of an adverse party in support of the Motion to Recuse.

Where the affidavit filed is signed by counsel for the party, the motion is invalid and should be denied. *Gilbert v. City of Little Rock, Arkansas, supra*, at 1398; *Roberts v. Bailer*, 625 F.2d 125, 128 (6th Cir. 1980); *United States ex rel. Wilson v. Coughlin*, 472 F.2d 100, 104 (7th Cir. 1973); *Giebe v. Pence*, 431 F.2d 942, 943 (9th Cir. 1970); *Paschall v. Mayone*, 454 F.Supp. 1289, 1299-1301 (S.D.N.Y. 1978) (affirming denial of § 144 disqualification motions accompanied only by affidavit of counsel); *Gilbert v. City of Little Rock, Arkansas*, 722 F.2d 1390, 1398 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 2347, 466 U.S. 972, 80 L.Ed.2d 820 (1983).

Three (3) days later, on January 21, 1994, the Affidavit of Susan E. Mason, Esquire, was filed. The Affidavit asserts that the affiant is "an attorney in the Office of the General Counsel" for General Motors Corporation and "a member of the General Motors' legal staff" who "manage(s) the defense" of these cases.

The Affidavit does not state that Staff Attorney Mason is an officer in the corporation and only indicates that she is a legal staff counsel in this litigation. Therefore, this is not an affidavit "of a party" and is legally insufficient under 28 U.S.C. § 144.

2. ONLY ONE AFFIDAVIT IN SUPPORT OF A MOTION TO RECUSE MAY BE FILED UNDER 28 U.S.C. § 144 AND THAT AFFIDAVIT MUST BE SERVED WITH THE MOTION TO RECUSE.

A motion to recuse under 28 U.S.C. § 144 must be accompanied by a legally sufficient affidavit of a party which avers a personal bias or prejudice against the party.

Only one affidavit may be filed. *United States v. Anderson*, 433 F.2d 856, 859 (8th Cir. 1970).

Rule 6(d) of the Federal Rules of Civil Procedure mandates: "When a motion is supported by an affidavit, the affidavit shall be served with the motion...."

The failure to accompany a motion to recuse asserting personal bias pursuant to 28 U.S.C. § 144 with a timely and sufficient affidavit renders denial of the motion appropriate. *United States v. Branch*, 850 F.2d 1080, 1083 (5th Cir. 1988); *Martin-Trigona v. Shiff*, 573 F.Supp. 1237, 1244 (D.Conn. 1983); *Galella v. Onassis*, 487 F.2d 986, 997 (2nd Cir. 1973); *Davis v. Fendler*, 650 F.2d 1154, 1163 (9th Cir. 1981).

Additional and subsequently filed affidavits need not be considered. *United States v. Anderson*, *supra*, at 859; *United States v. Hoffa*, 382 F.2d 856, 861 (6th Cir. 1967); *Martin v. Texas Indem. Ins. Co.*, 214 F.Supp. 477 (N.D.Tex. 1962), *cert. denied*, 377 U.S. 971, 84 S.Ct. 1652, 12 L.Ed.2d 470 (1964).

The Defendant filed its Motion to Recuse and Vacate Orders on January 18, 1994. Attachment One (1) to that motion is the Affidavit of Stephen G. Morrison, Esquire, an attorney of record for the Defendant. This Affidavit deals with the procurement of the audio tapes of speeches given by this Judge, Mr. James E. Butler, Jr., and Mr. J. Kendall Few, and alleges at paragraph seven (7) my presence "during the remarks made by Mr. Butler and Mr. Few."

Attachment D is the Affidavit of Ms. Angela C. Quintana which states that she transcribed three audio tapes containing seminar presentations by this Judge, by Mr. James E. Butler, Jr. and Mr. J. Kendall Few. This affidavit also states at paragraph two (2) that the transcriptions were made on December 16, 1993 and paragraph three (3) states that "the transcription of these presentations are being provided for the purposes of the captioned litigation." Paragraph one (1) asserts that Ms. Quintana is an employee of Defendant's law firm.

The third affidavit filed with the Motion to Recuse is Attachment Two (2), the Affidavit of Joel H. Smith, Esquire, an attorney of record for the Defendant. Mr. Smith's Affidavit

recounts his recollection of a telephone call allegedly occurring on December 8, 1993, which he claims to have had with the Court concerning the Court's scheduling of an expedited hearing and the Court's refusal to reschedule the expedited hearing.

All three affidavits filed with the Motion to Recuse on January 18, 1994, are legally insufficient for the following reasons: (1) No affidavit filed with the Motion to Recuse is the affidavit of a party; and (2) No affidavit filed with the Motion to Recuse avers that this Judge before whom the case is pending has a personal bias or prejudice against the party.

The Affidavit of Defendant's staff lawyer charged with managing these cases was not filed until January 21, 1994. It was not filed with the Motion to Recuse on January 18, 1994. It is the fourth in the series of affidavits filed. As noted earlier, additional subsequent affidavits need not be considered since 28 U.S.C. § 144 mandates the filing of only one affidavit. Therefore, the later filed Affidavit of Ms. Mason need not be considered. It was neither timely nor legally sufficient.

3. TO SUPPORT A MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 144, A LEGALLY SUFFICIENT AFFIDAVIT MADE BY A PARTY MUST BE FILED "ACCOMPANIED BY A CERTIFICATE OF COUNSEL OF RECORD STATING THAT IT IS MADE IN GOOD FAITH".

The Defendant's Motion to Recuse was filed on January 18, 1994 and was accompanied by the three (3) Affidavits discussed in the prior section of this Order. No Certificate of Counsel of Record stating that any of the three Affidavits filed were made in good faith accompanied the filing.

On January 21, 1994, the Defendant filed the fourth conclusory affidavit of Defendant's staff attorney stating her

"belief" that this Court had "a personal bias or prejudice" against the party defendant. This fourth affidavit was also not "accompanied by a Certificate of Counsel of Record stating that it is made in good faith."

On February 3, 1994, a Certificate executed by counsel of record was filed. The Certificate certified that (1) The Motion to Recuse and Vacate Orders and (2) the accompanying Affidavits "are made in good faith."

The failure to accompany a Motion to Recuse with "the good faith certification as expressly required by section 144" is a "significant defect and shall defeat a motion for disqualification." *Martin-Trigona v. Shiff, supra*, at 1187, citing *Walters v. United States*, 404 F.Supp. 996, 998 (S.D.N.Y. 1975), *aff'd mem.*, 542 F.2d 1166 (2nd Cir. 1976). The Motion to Recuse in the cases sub judice, and affidavits filed on January 18, 1994, were not accompanied by a Certificate of Counsel.

A motion to recuse "is deficient in form because the affidavit was not 'accompanied by a Certificate of Counsel of Record stating that it is made in good faith' as required by § 144." *Lamborn v. Dittmer*, 726 F.Supp. 510, 515 (S.D.N.Y. 1989). Neither the three (3) Affidavits filed on January 18, 1994, nor the Affidavit of Defendant's staff attorney filed on January 21, 1994, were accompanied by a Certificate of Counsel.

"If a certificate is to serve the purpose of shielding a court which cannot test the truth of claimed facts, it should at least carry the assertion that counsel believes the facts alleged to be accurate and correct." In re Union Leader, *supra*, at 385, *cert. denied*, 368 U.S. 927, 82 S.Ct. 361, 7 L.Ed.2d 190 (1961); *Lamborn v. Dittmer*, *supra*, at 515; *Duplan v. Deering Milliken*, *supra*, at 508.

Not only should the Certificate attest to the good faith of the affiant, but the Certificate should also state that counsel is himself acting in good faith in making the Certificate.

Selfridge v. Gynecol, Inc., 564 F.Supp. 57, 58 (D.Mass. 1983).

The Affidavit and the Certificate are strictly construed against the party seeking disqualification. 13A Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction, § 3551 at 631-633 (1984). The Certificate of Counsel of Record in these cases is both procedurally and legally deficient under 28 U.S.C. § 144.

The Certificate of Counsel of Record was filed on February 3, 1994, and *did not accompany* any of the four (4) Affidavits filed in this case as would be required under 28 U.S.C. § 144. Rather, the Certificate, according to the Certificate of Service, accompanied Defendant's Reply Memorandum in Support of the Defendant's Motion to Recuse and Vacate Orders.

Additionally, the Certificate of Counsel of Record only certifies that (1) the Motion to Recuse and Vacate Orders and (2) "the accompanying Affidavits, are made in good faith." The three (3) Affidavits accompanying the Motion to Recuse and Vacate Orders referred to in the Certificate of Counsel of Record are (1) the Affidavit of counsel of record, Stephen G. Morrison; (2) the Affidavit of counsel of record, Joel H. Smith; and (3) the Affidavit of Nelson, Mullins employee, Ms. Angela C. Quintana. None of these three (3) affidavits "accompanying" the Motion to Recuse and Vacate Orders are (1) the Affidavit of a party; and (2) no Affidavit "accompanying" the Motion to Recuse and Vacate Orders asserts that the Judge before whom the cases *sub judice* are pending "has a personal bias or prejudice" against the party defendant.

The Certificate of Counsel of Record makes no reference to the Affidavit of Defendant's staff attorney, Susan E. Mason, which was filed three (3) days after the Motion to Recuse and Vacate Orders. The Certificate only refers to the Affidavits "accompanying" the Motion. Pursuant to the mandates of 28 U.S.C. § 144, a party may file only one affidavit in any case and that affidavit "shall be accompanied

by a Certificate of Counsel of Record stating that it was made in good faith". Therefore, even if the Court were to assume that the Certificate filed February 3, 1994 remedied the technical defect inherent in the original three (3) "accompanying affidavits" filed with the Defendant's Motion to Recuse and to Vacate Orders, that defect would not be remedied as to the fourth Affidavit filed three (3) days after the Motion.

The "Certificate" is legally insufficient under section 144 to support the Defendant's Motion to Recuse and Vacate Orders.

4. TIMELY FILING:

"Section 144 also explicitly requires that a motion for recusal must be timely made.... In general, motions to recuse must be filed at the first opportunity after discovery of the facts tending to prove disqualification. *Duffield v. Charleston Area Medical Center*, 503 F.2d 512, 515 (4th Cir. 1974); *Chafin v. United States*, 5 F.2d 592, 594, 595 (4th Cir.), *cert. denied*, 269 U.S. 552, 46 S.Ct. 18, 70 L.Ed. 407 (1925)." *Sine v. Local No. 992 International Brotherhood of Teamsters*, *supra*, at 915.

Timeliness is an essential element of a recusal motion and is vital to prevent waste and delay. *United States v. Owens*, 902 F.2d 1154, 1155-1156 (4th Cir. 1989). In addition, timeliness is required to prevent a defendant from "test[ing] the waters with a particular judge and then tak[ing] steps to create recusal grounds if the waters proved uncomfortably hot." *Owens*, *Id.* at 1156; *see also*, *In re Union Leader Corporation*, *supra*, at 990.

Courts have held a lapse of twelve (12) days to render a recusal motion untimely. *In re Martin v. Trigona*, 573 F.Supp. 1237, 1244 (D.Conn. 1983). *See also In re Shoe Machinery Corp.*, 276 F.2d 77, 79 (1st Cir. 1960) ("We cannot permit a litigant to test the mind of a trial judge like a boy testing the temperature of the water in the pool with his toe,

and if found to his liking, decides to take a plunge.") Nothing is more important in an affidavit than timeliness, and its counterpart, waiver. *Id.* at 79. The statute does not permit second guessing.

The amount of time between the factual event allegedly creating grounds for recusal and the filing of the affidavits depends on the facts and circumstances surrounding the case.

Under the facts in this case, the recusal Motion filed January 18, 1994 and the Affidavit of Susan E. Mason, Esquire (even if it had been legally sufficient, which it is was not) alleges the Court's "participation" in the Auto Torts Seminar in Atlanta, Georgia as grounds for recusal. That seminar took place on December 3-4, 1993. The Affidavit of Ms. Mason was not filed until January 21, 1994, seven (7) weeks later.

"The United States Court of Appeals for the Fourth Circuit has repeatedly stated that a reasonable challenge against a trial judge for bias and prejudice 'must be made at the first opportunity after discovery of the facts ... [allegedly requiring] disqualification.' "*Duplan Corporation v. Deering Mulliken, Inc., supra*, at 509, citing *Chafin v. United States*, 5 F.2d 592, 595 (4th Cir. 1925), *cert. denied*, 269 U.S. 552, 46 S.Ct. 18, 70 L.Ed. 407, quoted with approval in *Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512 (516) (4th Cir. 1974) (Russell, J.).

In the interim, the Court held three (3) motions hearings and issued Orders regarding discovery and other pretrial matters in this case between the date of the Seminar and the filing of the Defendant's Motion.

The hearings were held on December 10, 1993, December 17, 1993, and December 21, 1993. Additional hearings were held on January 21, 1994 and January 25, 1994. An oral Order was issued December 10, 1993 granting General Motors' Motions for Protective Orders; the other Orders are dated December 30, 1993, filed January 4, 1994 (directing General Motors to produce all documents relating to 14 "Key

Memo's" and directing Plaintiff to submit evidence of document destruction); December 30, 1993, filed January 4, 1994 (authorizing depositions of outside legal counsel; December 30, 1993, filed January 4, 1994 (denying General Motor's motion for certification of issues for interlocutory appeal or for a stay of Orders dated December 17 and 21, 1993 pending appeal); December 30, 1993, filed January 4, 1994 (ordering inspection of computer database); and December 30, 1993, filed January 4, 1994 (directing General Motors to produce additional documents *in camera*).

Even more telling is the fact that the Defendant continued to file motions of its own in this case, submitting no less than four (4) motions for this Court's consideration between the time of the Seminar and the filing of the Motion to Recuse on January 18, 1994. *See*, Defendant's Motion to Continue Hearing set for December 10, 1993, filed December 10, 1993; Motion for Affirmation of Privileges, filed December 10, 1993; Memorandum on December 10, 1993 Hearing, filed December 17, 1993; and Motion for Certification of Issues, filed December 30, 1993. In addition, General Motors filed nineteen (19) Affidavits on various substantive (non-recusal) matters in the December 3, 1993 through January 18, 1994 time frame. One of the Defendant's Motions asked this Court to rule affirming General Motors' claims of privilege on hundreds of documents. It was only after this Court ruled on these issues in its five (5) Orders dated December 30, 1993 and filed January 4, 1994, (which disposed of Motions made and heard December 10, 17 and 21), that the Defendant found the Court's Seminar comments on December 3, 1993 to evidence an alleged personal prejudice against the defendant party under 28 U.S.C. § 144.

It is clear that counsel in this case waited to see the outcome of the Motions filed and heard relating to Plaintiffs' allegations of discovery abuse by counsel and only then decided to file the Motion to Recuse on January 18, 1994.

The Motion to Recuse and Vacate was not timely filed.

5. LEGAL SUFFICIENCY OF THE ONE SUPPORTING AFFIDAVIT OF A PARTY REQUIRED UNDER 28 U.S.C. § 144.

In assessing an affidavit's legal sufficiency, the Judge may not consider the truth of the facts alleged. *Berger v. United States*, 255 U.S. 22, 35-36, 41 S.Ct. 230, 234, 65 L.Ed. 481 (1921).

In passing on the legal sufficiency of an affidavit, "a judge must assume that the factual averments it contains are true, even if he knows them to be false. *United States v. Jeffers*, 532 F.2d 1101, 1112 (7th Cir. 1976), *aff'd in part and vacated in part*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977); *United States v. Barnes*, 909 F.2d 1059, 1071 (7th Cir. 1990).

The factual averments must give "fair support to the charge of a bent mind that may prevent or impede impartiality of judgment." *Berger v. United States*, *supra*, 255 U.S. at 33-34, 41 S.Ct. at 233.

"The factual allegations which are said to show that 'bent of mind' must establish, by more than a prima facie case, that 'the mind of the judge is closed to justice'." *Duplan Corporation v. Deering Milliken, Inc.*, 400 F.Supp. 497, 507 (D.S.C. 1975).

The factual allegations and averments in the required affidavit of a party must not be mere conclusions, opinions, or rumors. *United States v. Haldeman*, 559 F.2d 31, 134 (D.C.Cir. 1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977).

Conclusions, rumors, beliefs, and opinions are not sufficient to form a basis for disqualification. *Berger v. United States*, *supra*, 255 U.S. at 34, 41 S.Ct. at 233, 65 L.Ed. 481 (1921) (construing predecessor statute).

The allegations in the affidavit of the party must be stated with particularity and must be definite as to times,

places, persons, and circumstances. *United States v. Haldeman*, *supra*, at 134.

The affidavit of the party is strictly construed against the affiant, and there is a substantial burden on the moving party to demonstrate that the judge is not impartial. *United States v. Hall*, 424 F.Supp. 508, 534 (W.D.Okla. 1975), *aff'd*, 536 F.2d 313 (10th Cir.), *cert. denied*, 429 U.S. 919, 97 S.Ct. 313, 50 L.Ed.2d 285 (1976); *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987); *Lamborn v. Dittmer*, *supra*, at 514.

Intemperate statements are not a legally sufficient ground for a motion to recuse. *Hinman v. Rogers*, *Id.*, citing *Johnson v. Trueblood*, 629 F.2d 287, 291 (3rd Cir. 1980), *cert. denied*, 450 U.S. 999, 101 S.Ct. 1704, 68 L.Ed.2d 800 (1981).

The factual averments in the affidavit of the party must assert that the personal bias or prejudice against the party stems from an extrajudicial source, i.e., some source other than what the judge has learned through participation in the case. *United States v. Grinnell Corporation*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966); *United States v. Barnes*, *supra*, at 1071.

And that extrajudicial bias must result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. *N.L.R.B. v. Honaker Mills*, 789 F.2d 262, 266 (4th Cir. 1986); *United States v. Crowell*, 586 F.2d 1020, 1027 (4th Cir. 1978), *cert. denied*, 440 U.S. 959, 99 S.Ct. 1500, 59 L.Ed.2d 772 (1979).

A review of the Affidavit of Defendant's staff attorney Susan E. Mason, Esquire, reveals that it is composed entirely of "conclusions", "opinions", and "beliefs". The Affidavit is then legally insufficient under 28 U.S.C. § 144 and under the rule set out in *Berger v. United States*, *supra*, 255 U.S. at 34, 41 S.Ct. at 233. Each and every averment in the Affidavit is premised solely and only on a "belief" held by the affiant.

The source of these "beliefs" is not disclosed. Obviously, none of the other Affidavits meet the statutory

criteria under Section 144.

6. PERSONAL BIAS OR PREJUDICE AGAINST A PARTY AND THE EXTRAJUDICIAL SOURCE REQUIREMENT.

28 U.S.C. § 144 requires that the Affidavit aver that "the judge before whom the matter is pending has a personal bias or prejudice" against the party. However, no fact supporting a personal bias or prejudice against the Defendant in this case is advanced.

Averment Two (2) in the Affidavit of Defendant's staff attorney Susan E. Mason states a "belief" that the Court has a personal bias or prejudice" against General Motors. A "belief" is legally insufficient. *Berger v. United States, Id.* No facts are stated supporting Ms. Mason's "belief" that an alleged "personal bias and prejudice" exists, only more "beliefs". Conclusory allegations do not constitute the required statement of "Facts", nor are the required "reasons" stated. Again, only "beliefs" not "facts" and "reasons" for the belief that bias or prejudice exists are enumerated in the Mason Affidavit.

Finally, the premise is fundamental that any alleged personal bias or prejudice as to the party in a case *sub judice* must stem from an extrajudicial source and not what the Court has learned in a particular case.

The Affidavit of Defendant's staff attorney, Susan E. Mason, Esquire, contains Averments Three (3) and Four (4) asserting a "belief" that the "personal bias and prejudice" stem from attendance at and participation in the South Carolina Trial Lawyers Association Continuing Legal Education Seminar on December 3 and 4, 1993. This is also legally insufficient to meet the requirements of 28 U.S.C. § 144.

Also, the Affidavit fails to assert that the alleged personal bias or prejudice has resulted in any opinion on the merits on some basis other than what the Court has learned

from its participation in the case. The Affidavit of Defendant's staff attorney fails to comply with the requirements of 28 U.S.C. § 144 under the strict scrutiny required.

CONCLUSIONS OF LAW AS TO DEFENDANT'S MOTION TO RECUSE AND VACATE ORDERS PURSUANT TO 28 U.S.C. § 144.

1. I find as a matter of law that the Affidavit of Stephen Morrison, one of Defendant's counsel of record, filed with and accompanying the Defendant's Motion to Recuse on January 18, 1994, in the cases *sub judice*, is legally insufficient, is not the Affidavit of a party, and does not aver that the Judge before whom the matter is pending has a personal bias or prejudice against the party defendant, all as required by 28 U.S.C. § 144.

2. I find as a matter of law that the Affidavit of Ms. Angela C. Quintana, filed with and accompanying the Defendant's Motion to Recuse, is legally insufficient, is not the Affidavit of a party, and does not aver that the judge before whom the matter is pending has a personal bias or prejudice against the party defendant, all as required by 28 U.S.C. § 144.

3. I find as a matter of law that the Affidavit of Joel H. Smith, one of Defendant's counsel of record, which was filed with the Defendant's Motion to Recuse on January 18, 1994 in the cases *sub judice*, is legally insufficient, is not the affidavit of a party, and does not aver that the judge before whom the matter is pending has a personal bias or prejudice, all as required by 28 U.S.C. § 144.

4. I find as a matter of law that the Motion by the party defendant pursuant to 28 U.S.C. § 144 was not timely made.

5. I find as a matter of law that the Affidavit of Susan E. Mason, one of Defendant's staff attorney, charged with the management of these cases is not the affidavit of a party as mandated by 28 U.S.C. § 144.

6. I further find as a matter of law that the Affidavit of Susan E. Mason, one of Defendant's staff attorneys, is legally insufficient in that the Affidavit is conclusory, and only avers opinions and beliefs, not the statement of facts required by 28 U.S.C. § 144.

7. I find as a matter of law that while 28 U.S.C. § 144 allows the filing of only one affidavit of a party with a party's motion to recuse, multiple insufficient affidavits were filed with this Motion to Recuse.

8. I find as a matter of law that the Court need not consider additional affidavits filed in support of a party's motion to recuse.

9. I find as a matter of law that the Affidavit of Susan E. Mason, Defendant's staff attorney, need not be considered as it was not filed with the Defendant's Motion to Recuse pursuant to 28 U.S.C. § 144, as required by Rule 6(d) of the Federal Rules of Civil Procedure, and was the fourth (4th) Affidavit filed.

10. I find as a matter of law that the Motion to Recuse and Vacate Orders pursuant to 28 U.S.C. § 144 and the three (3) "accompanying" Affidavits were legally insufficient in that they were not accompanied by a Certificate of Counsel of Record stating that the Affidavits were made in good faith.

11. I find as a matter of law that the Certificate of Counsel of Record filed February 3, 1994, is legally insufficient because the Certificate did not accompany any of the three (3) Affidavits filed on January 18, 1994.

12. I find as a matter of law that the Affidavit of Susan E. Mason, one of Defendant's staff attorneys, is legally insufficient because it was not accompanied by a Certificate of Counsel of Record stating that it was made in good faith as is mandated by 28 U.S.C. § 144.

13. I further find as a matter of law that even if the legal insufficiency of any one of the first three (3) Affidavits

filed accompanying the Defendant's Motion to Recuse and Vacate Orders on January 18, 1994, was abrogated by the subsequent filing of the Certificate of Counsel of Record, those Affidavits remain deficient in content pursuant to the mandated criteria enunciated under 28 U.S.C. § 144.

14. I find as a matter of law that the Certificate of Counsel of Record by its terms only certifies that the Affidavits accompanying the Motion to Recuse and Vacate Orders were made in good faith.

15. I find as a matter of law that the Certificate of Counsel of Record by its terms excludes the Affidavit of Defendant's staff attorney, Susan E. Mason, which did not accompany the Defendant's Motion to Recuse and which was later filed on January 21, 1994.

16. I find as a matter of law that the Certificate of Counsel of Record is legally deficient in that it accompanied, not the affidavit of a party, but the Defendant's Reply to Plaintiffs' Response to Defendant's Motion to Recuse and Vacate Orders filed February 3, 1994.

17. I further find as a matter of law that the Certificate of Counsel of Record is legally insufficient in that the Certificate fails to carry the assertion that counsel believes the facts alleged in any affidavit filed to be accurate and correct. *See In re Union Leader*, *supra*, at 385; *United States v. Danrahan*, 248 F.Supp. 471, 478 (D.D.C. 1965); *Duplan v. Deering Milliken*, *supra*, at 508; and *Lamborn v. Dittmer*, *supra*, at 515.

18. I find as a matter of law that the Defendant's Motion to Recuse and Vacate Orders pursuant to 28 U.S.C. § 144 is deficient in substance and in form for the reasons stated above.

19. I find as a matter of law that the Defendant's Motion to Recuse and Vacate Orders has failed to meet either the procedural or substantive requirements of 28 U.S.C. § 144.

20. I find as a matter of law that disqualification is not required by the Canons of the Code of Judicial Conduct.

The Defendant's Motion to Recuse and Vacate Orders pursuant to 28 U.S.C. § 144 is denied.

II. DEFENDANT'S MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455 FINDINGS OF FACT

Defendant appears to advance and rely upon five grounds for the assertion that a reasonable person might question this Court's judicial impartiality under 28 U.S.C. § 455(a):

1. ATTENDANCE AT THE SOUTH CAROLINA TRIAL ATTORNEYS' AUTO TORTS SEMINAR IN ATLANTA, GEORGIA ON DECEMBER 3RD AND 4TH, 1993.

General Motors counsel have asserted that my "*active participation in a plaintiffs' automobile torts seminar, which focused heavily on pending side-impact truck fire cases against General Motors*," (emphasis added), displays my "personal involvement in the subject matter."

First, the seminar is, and has been for sixteen (16) years, entitled "Auto Torts". A review of the program and seminar materials, however, reveals that this program encompassed two (2) days, December 3 and 4, 1993, and provided twelve (12) Continuing Legal Education Credit hours, including two (2) Continuing Legal Education hours for ethics.

My presentation involved a recent Fourth Circuit Court of Appeals case, *Strock v. Southern Farm Bureau Casualty Insurance Company*, an Unpublished Opinion that approves introduction and admission of computer animation into evidence, and two (2) recent United States Supreme Court decisions, *Daubert v. Merrell Dow*, and *TXO Production Corporation v. Alliance Resources Corporation.* The

Honorable William B. Traxler, Jr., United States District Court Judge, spoke on "The Future in the Courts"; The Honorable Joseph F. Anderson, Jr., United States District Court Judge, Columbia, South Carolina, spoke on "Closing Arguments"; Former Chief Judge of the South Carolina Court of Appeals, Alexander M. Sanders, Jr., spoke on "Ethics Beyond the Code"; and University of South Carolina Law Professor, John P. Freeman, Esquire, spoke on "Ethical Considerations". From a further brief review of the program and the fifteen (15) presentations listed, other than Mr. Butler's presentation entitled "The Facts Behind the $100M Verdict" (Butler's materials were not included in the printed program materials), only three (3) of the fifteen (15) presentations appear to deal with automobile litigation at all. Those are entitled: "Automobile Restraint Systems" presented by Mr. Michael S. Cohen, Esquire, Miami, Florida; "Recognizing, Developing and Presenting the Crash-Worthiness Case", presented by J. Kendall Few, Esquire, Greenville, South Carolina; and "Update on Auto Insurance", presented by Eugene C. Covington, Jr., Esquire, Greenville, South Carolina.

Therefore, the seminar did not "focus heavily" on "pending side impact truck fire cases against General Motors". See, Program and Printed Materials, COURT'S EXHIBIT NUMBER ONE (1).

Further, I did not hear the presentation made by Mr. James Butler on Friday, December 3, 1993. My first exposure to Mr. Butler's presentation was in review of the attachments to General Motors' Motion for Recusal in this case. Additionally, I heard none of the other presentations, with the exception of those presented by Gedney M. Howe, III, Esquire, Judge William B. Traxler, Jr., and Judge Joseph F. Anderson, Jr.

Additionally, I neither organized nor "actively" participated in the organization of the program for the Auto Torts Seminar. I was approached by Terry Richardson, Esquire, Seminar Chairman, and asked to present a Continuing

Legal Education Session for the program. I agreed to do a presentation on several major decisions affecting civil litigation which came down during 1993. I had no input into the program.

My expenses were not paid by the South Carolina Trial Lawyers Association beyond the cost of my room. See Affidavit of Ms. Linda M. Franklin, Executive Director of the South Carolina Trial Lawyers Association. COURT'S EXHIBIT NUMBER TWO (2).

2. BIAS AND PREJUDICE AGAINST "AUTOMOBILE TORTS" AND "PRODUCTS LIABILITY" DEFENDANTS AS EVIDENCED IN THE DECEMBER 3RD, 1993 TALK.

As a frequent speaker, I have found that humor is an effective educational tool. By mischaracterizing statements patently intended to be humorous, the Defendant attempts to cast doubt upon the ability of this Court to render a fair and unbiased trial. The Defendant literally "cuts and pastes" statements from different portions of the speech, strategically placing them together in a manner designed to make the innocuous appear sinister.

The Defendant further represents in its Memorandum in Support of Defendant's Motion to Recuse and Vacate Orders that I was the "honored guest" at the SCTLA Conference. [Defendant's Brief at page 3]. However, a review of the very first page of the conference materials at the bottom of the page reveals that the "honored guest" was Richard J. Foster, "one of the founding members and our President Emeritus."

General Motors asserts that I delivered a speech to the SCTLA Legal Seminar audience that "denigrated automobile tort defendants, defense attorneys, and defense expert witnesses" [General Motors' Memorandum, p. 7], based on isolated remarks extracted out of context from my speech.

Any reasonable person listening to the audio tape of my speech could not believe that any comments made in the course of my presentation were intended to be anything other than humorous.

The Defendant attempts to fabricate "bias or prejudice" against defendants and defense attorneys by pulling sentences out of context and ignoring the humor that was intended.

The first portion of my talk dealt with computer animation as demonstrative evidence. The second segment of my presentation dealt with the United States Supreme Court decision, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), which I characterize as arguably the most significant scientific evidence decision in the history of the Federal Rules of Evidence. The decision holds that a defendant will no longer be entitled to summary judgment because the plaintiff's expert's opinion is not "generally accepted" by the scientific community. I further pointed out in the seminar materials that the Supreme Court listed a number of factors to be considered by the trial judge before allowing scientific opinion to be considered by a jury.

The third segment of my seminar presentation dealt with punitive damages and the United States Supreme Court decision in *TXO Production Corporation v. Alliance Resources Corporation*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). I commented on the consistent practice of some defendants and defense counsel to file repeated motions challenging the constitutionality of punitive damages ignoring the United States Supreme Court ruling in *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). This Court is besieged with "canned" motions seeking to have punitive damages declared unconstitutional and I do, in fact, use a "canned" order to deny these frivolous motions rather than expend the Court's time. The Court is under no legal obligation to grant a hearing on such motions.

As to my enjoyment of my profession, I make no

apologies. I enjoy my judicial role and I take great pleasure in presiding over a well tried case, whether by defendant or plaintiff, or both.

Again, if one listens to the audiotape of the presentation, it is clear that the comments and phrases, which the Defendant has taken out of context and which the Defendant relies on in support of its Motion for Recusal, were used only in a humorous vein and were clearly not indicative of the attitude which this Defendant has attempted to impute to me as evidencing a general attitude toward defendants and their attorneys. The true humorous intent can be gleaned from an exact quote of my remarks:

> But, you know, I just got back from the defense trial lawyers meeting in Sea Island, Georgia. *You know, most of those fellows are pretty nice.* (emphasis added). *They really are* (emphasis added), but some of them, you know, they have that puritanical attitude just that kills them. They think that somebody, sometime, somewhere, is actually enjoying themselves and it kills them. They can't stand it. And, you know, they're so pessimistic, you know they walk in a room, smell flowers and they start looking around for the casket. But, and while we were down there, you know, we all accept the fact that fish is brain food. You know what they serve three times a day at the defense lawyers? Whale. The only exercise—some of them gets, is stretching the truth--that's about all they ever get. But while I was there they nominated Terry, where is Terry? They gave Terry—I don't know whether it is an award or not—but they nominated him as the catcher for next year's olympic javelin team. That could or could not be an honor. I don't know.

Additionally, "the alleged bias" must derive from an extrajudicial source. It must result in an opinion on the merits on a basis other than that learned by the Judge from his participation in the matter. *United States v. Grinnell*

Corporation, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966). The nature of the Judge's bias must be personal and not judicial. *Shaw v. Martin*, 733 F.2d 304, 308 (4th Cir. 1984). A judge is not disqualified because his familiarity with the facts of a case stem from his judicial conduct in presiding over earlier proceedings. *United States v. Parker*, 742 F.2d 127 (4th Cir. 1984). *In re Diana R. Beard, et al.*, 811 F.2d 818, 827 (4th Cir. 1987).

As to my congratulations issued to three plaintiff's attorneys for receiving the largest personal injury verdict in South Carolina history, Twelve Million Five Hundred Dollars ($12,500,000.00) in actual damages, I congratulate any and every attorney, both plaintiff and defendant, for a case well tried.

There was no bias or prejudice evidenced against automobile tort defendants, against products liability defendants, against any class of defendant, nor against any particular defendant in my presentation.

General Motors also makes much of my characterization of the plight of the defense attorney who, under the rules laid down in the Fourth Circuit for the handling of punitive damages, has to stand up in front of a jury which has just returned an actual damages verdict against a defendant and plead for mercy. While my descriptology might have been somewhat intemperate, the message I attempted to convey would have been both clear and less offensive had I utilized the adjective "poor."

3. ALLEGATIONS THAT THE COURT WAS EXPOSED EX PARTE TO A "PRE-SCREENING" OF THE PLAINTIFFS' CASE AND THAT MAJOR DISCOVERY ISSUES TO BE ARGUED TO ME LATER WERE "PREVIEWED" OUT OF THE PRESENCE OF GENERAL MOTORS' COUNSEL.

The Memorandum in Support of Defendant's Motion to Recuse and Vacate Orders, at page 5, asserts that attorneys for the plaintiffs in this case, in my presence and *ex parte*, offered their views on a wide range of issues concerning the side-impact truck fire cases in which General Motors is a defendant, "*including facts and arguments directly at issue in this case.*" (emphasis in the original). Also, a General Motors' staff attorney, Susan Mason, has submitted an affidavit to this Court which states "her belief" that no General Motors' lawyers were present in Atlanta at the SCTLA program.

The Affidavit of SCTLA Executive Director, Ms. Linda M. Franklin, attests to the attached List of Attendees at the meeting. See COURT'S EXHIBIT NUMBER TWO (2). A review of the list indicates that five (5) attorneys from General Motors' counsel, the Nelson Mullins Law Firm, were present: (1) Kemila C. Johnson; (2) Elizabeth Scott Moise; (3) John F. Kuppens; (4) Christopher McCool, and (5) Deidre M. Shelton.

John Kuppens is an associate in the Products Liability Section of the Nelson Mullins Firm and works directly for Mr. Morrison, lead local counsel in this case. Ms. Shelton, although listed as being in the Charleston office, has been an active participant in this litigation. See PLAINTIFFS' EXHIBIT NUMBER J.

At approximately 2:15 p.m. on Friday, February 25, 1994, some fifteen (15) minutes before the time the hearing on the Defendant's Motion to Recuse and Vacate Orders was scheduled to begin, the Defendant had delivered to this office five (5) new affidavits which had been filed as of this date. Although untimely, I have still considered these affidavits.

Further, my presentation was from 9:00 a.m. to 9:45 a.m. on Friday morning, December 3, 1993. Following the completion of my talk, I shook hands with several people, left the room, and went out into the hallway. See Affidavit of The Honorable H. Dean Hall, COURT'S EXHIBIT NUMBER THREE (3); Affidavit of John A. Hagins, Jr., COURT'S EXHIBIT NUMBER FOUR (4); Affidavit of Gedney M.

Howe, III, Esquire, COURT'S EXHIBIT NUMBER FIVE (5); Affidavit of Judith A. Leatherwood, Esquire, COURT'S EXHIBIT NUMBER SIX (6); Affidavit of William M. Grant, Jr., Esquire, COURT'S EXHIBIT NUMBER SEVEN (7); and COURT'S SUPPLEMENTAL EXHIBIT NUMBER ONE (1), the Affidavit of Linda M. Franklin, dated February 21, 1994.

I did not hear the presentation made by Attorney James Butler. Nor did I hear the presentation made by Attorney J. Kendall Few from 4:45 p.m. to 5:30 p.m. on Friday, December 3, 1993. I did return to the lecture hall minutes before the conclusion of Mr. Few's address, stuck my head in the door, saw that the program was still underway, stood a few moments, and left the room on the way to a social event in a room across the hall from the lecture hall.

Defendant has asserted to this Court and references, at pages 5-7 in its Memorandum, the following specific "issues" allegedly "previewed" and "pre-screened" *ex parte* by Plaintiffs' attorneys, in my presence, i.e.,:

(1) General comments on the *Moseley v. General Motors Corporation* case tried in Georgia by Mr. James Butler and the Defendant's attempts to hide evidence.

(2) Allegations of document destruction including reference to young lawyers employed by the Defendant from regional defense firms around the country who supposedly went to Detroit to go through General Motors' engineers' files, and to shred documents "that might be misinterpreted," as well as reference to a deposition of a General Motors' engineer that Defendant's lawyers carted away box loads of documents to be shredded;

(3) Allegations of twenty-four (24) crash tests and twenty-four (24) failures and calculated discovery abuse employed in the Moseley case by the Defendant;

(4) The order of this Court requiring the Defendant to produce a Privilege Log disclosing that one of Defendant's lawyers from King and Spaulding had reported on Mr. Butler

and a talk that he had made at a seminar; and

(5) "A foretaste" of the Plaintiffs' position on the merits by raising arguments presented in the Moseley case that "would soon have to be considered again in Cameron." The Defendant's Memorandum makes the representation that in the presence of the Judge," Mr. Butler asserted that the Defendant's engineers had opposed the fuel tank design.

A review of the record in this case reveals the following:

A hearing was held before me in this case on September 20, 1993 on the Plaintiffs' Motion to Compel Responses to Interrogatories at which time I advised both parties that it was "going to cost somebody a hundred dollars per interrogatory ... so it is going to cost. If you're wrong on them, a hundred dollars per interrogatory." [9-20-93 Hearing Transcript, p. 3, 1. 7-13].

I further advised counsel for both plaintiffs and General Motors: "Well, if it is proved that they (plaintiffs) are asking for something and they are insisting on it, then I'm going to make them pay for it. As I say, gentlemen, I am sick and tired of making a judicial career of such trivia. And I'm going to put a stop to it. So when you raise an objection or when you ask for something, you better know what you're doing. I'm going to take care of it. It is going to be a two-edged sword. It's going to cut both ways." [9-20-93 Hearing Transcript, p. 12, 1.. 22--p. 13, 1. 4].

The plaintiffs were advised that they would pay for the production and copying and transport of documents from Detroit to South Carolina at "a reasonable rate per page." [9-20-93 Hearing Transcript, p. 15, 1. 1-12].

I then advised the Plaintiffs' attorneys, "And if you want to insist on all of these tons of documents, then you're doing to have to pay for it. And if you make a request which I deem unreasonable, then you're going to have to pay the fine. If he refuses, he's (Defendant's counsel) going to pay the fine.

But it is a hundred dollars per interrogatory. And if they can be produced, they are going to be produced at a cost of whatever I determine per page, per copy." [9-20-93 Hearing Transcript p. 21, 1. 10-20].

Over two-thirds of this hearing concerned the production of the Defendant's Crash Test Log maintained by the Defendant on all crash testing performed by the Defendant, and specific crash test reports.

During this hearing, the Plaintiffs' attorneys represented that General Motors' employees had, in the 1970s, discussed "how a prop shaft can penetrate a fuel tank if it is located between the frame rail." [9-20-93 Hearing Transcript. p. 20, 1. 11-15]

It was during this hearing that the Moseley verdict was first discussed in this Court. The Plaintiffs' lawyers stated: "The Moseley verdict was the case in Atlanta where the jury gave One Hundred Million in punitive damages to the Moseleys against General Motors involving a side-saddle pickup truck." [9-20- 93 Hearing Transcript, p. 22, 1. 7-10].

The next hearing in this case held before me was on October 12, 1993, which again concerned purported discovery abuses by the Defendant.

During this hearing, Plaintiffs' attorneys disclosed to the Court the existence of a directive issued by a General Motors' truck engineer named Mair that stated "Fuel tanks must be mounted outside the cab and as close to the center of the vehicle as practical," [10-12-93 Hearing Transcript, p. 8, 1. 6- 11]; and a second General Motors' truck engineering memorandum stating "Moving these side tanks inboard of the frame might eliminate most of these potential leakers." [10-12-93 Hearing Transcript, p. 8, 1. 12-14].

At this time, General Motors had never objected to specific document production requests on grounds of attorney-client privilege. [10-12-93 Hearing Transcript, p. 10, 1. 13--p. 11, 1. 1].

It was during this same hearing on October 12, 1993, some six (6) weeks prior to the speech given by Mr. James Butler, that Plaintiffs' counsel stated:

Mr. John Few: In the early 1980's, I'm not sure exactly when, the process of responding to discovery in these GM truck cases was taken over by the GM Legal Department from the Engineering Department. So whenever it was in the early 1980's, when there was a discovery request made in a case, the Legal Department was answering the request. In addition, you remember when we discussed at the last hearing the Legal Department came to the office of an engineer named Kashmerick who had kept all of the relevant documents on GM trucks and they said, "Give us all your documents." And according to Kashmerick's testimony in his deposition in a previous case, they destroyed them all except for about two briefcases full that they took off and he never saw again.

So the Legal Department has been intimately involved in the evaluation of what happens with these GM trucks. We are not looking for things where they're talking about how to defend a lawsuit. We're looking for situations where the Legal Department is involved in whether to recall the trucks, whether to change the design of the trucks, and that kind of thing. And I think we're entitled to that. [0-20-93, Transcript Hearing, p. 11, l. 14–p. 12, l. 11].

With respect to a pre-screening of the "twenty-four (24) crash tests, these tests were disclosed and argued in this very same October 20, 1993 hearing, and Plaintiffs' attorney stated:

Mr. John Few: We just have two more. In Mark Cameron's case, Request Number 3, a similar situation. There is a GM former engineer and a former expert witness for GM in these pickup truck cases who has left GM and testified for the Plaintiff in the Moseley case down in Atlanta earlier this year as a result of—as I understand it, as a result of being misled by GM as to whether or not some crash tests were done on these pickup trucks and being sent to San Francisco in 1983 to testify in favor of the GM design when GM had done some

crash tests, 23 crash tests, in which the gas tanks—as he said, "Split open like melons." And he was not told about those tests until after the trial. He testified as an expert and as a witness for the Plaintiff.... Okay, Your Honor. The witness's name is Mr. Elwell, a former GM....

The Court: Ronald Elwell.

Mr. John Few: Yes, sir, a former GM engineer and testified as an expert for GM in these truck cases, including one in 1983 in San Francisco which he was specifically asked by the Judge out there whether GM had produced all of the crash tests. He responded, "Yes," because he thought that was a correct answer. When he got back to Detroit, his superior said, "You might ought to go out there on the proving ground and see some of the stuff we have been doing." And he went out there and he found 24 crashed GM pickup trucks that he had never been told about, each of which, as he said as I understand it, had gas tanks that were split open like melons. He then dropped out of the scene on behalf of GM and ultimately came to testify for the plaintiff in the trial, down in Atlanta earlier this year in which there was a hundred million dollar verdict rendered. In that case, General Motors produced to the Court, and this is in the Atlanta trial, five boxes of documents that were taken from Elwell at some point and the Court never got a chance to rule on them because they produced them so late that the trial got started. But anyway, they still haven't been produced to any plaintiff. And those are the documents we're looking for. We got supplemental answers on Friday that indicated that they are going to provide 400 pages out of those five boxes, but the rest of them, they won't produce them. They haven't given us a privileged log on any of that stuff. These are Ron Elwell's personal files that he kept in the course of his work as a truck engineer at GM. I'm not sure exactly how it happened, but my understanding is that at a deposition, in a lawsuit between Mr. Elwell and GM, the documents were taken by GM and claimed to be privileged. So Mr. Elwell doesn't have copies of them. [10-12-93 Hearing Transcript, p.

21, l. 14--p. 23, l. 18].

It should be noted that the Kashmerick deposition, which discloses document destruction by General Motors' lawyers, "shredding" of documents, and the "carting" away of documents to be shredded, discloses the "facts" the Defendant would have this Court believe were "previewed" in Mr. Butler's alleged ex parte presentation on December 3, 1993 to this Court, was filed with this Court on July 21, 1993 as Exhibit F to the Brief in Support of Plaintiffs' First Motion to Compel General Motors to Respond to Plaintiffs' First Document Requests and First Interrogatories in the Mark Cameron Case, C/A No. 6:93-1278- 3, and was a part of the record in this case for some four (4) months prior to the seminar in Atlanta on December 3, 1993.

Although I was not present for the speech given by Mr. James Butler, nor was I present for the speech given by Mr. Kendall Few, it is patently clear that there was neither a "pre-screening" nor a "preview" of any allegations concerning (1) concealment of evidence; (2) destruction of documents; (3) the use of young lawyers from General Motors' regional defense firms to go through General Motors' documents and shred those documents inimical to General Motors' interests; (4) the twenty-four (24) crash tests of General Motors' side trucks; (5) opposition by General Motors' truck engineers to the truck's design; (6) the Kashmerick deposition and his testimony that General Motors' lawyers destroyed all of his relevant documents with the exception of two (2) briefcases full which they took; or (7) the former General Motors' Engineer Ron Elwell's testimony in the Moseley case that General Motors' performed some twenty-three (23) crash tests on the trucks in which the gas tanks "split open like melons."

All of the facts and issues which General Motors misrepresents were "previewed" and "pre-screened" in ex parte communication by Mr. Butler and Mr. Few in Atlanta on December 3, 1993 in their speeches, were already a part of the record in this case. Additionally, since there were five (5)

attorneys from the Nelson Mullins Law Firm, local counsel for General Motors, any communication could hardly have been ex parte. At least one, Ms. Shelton, has apparently actively participated in this case by taking ten (10) depositions for General Motors and participated in a vehicle inspection in this case representing General Motors.

If Defendant had conducted an "objectively reasonable investigation" of the facts and record in this case, these allegations of "preview" and "pre- screening" could not have been made.

4. ALLEGED COMMENTS MADE DURING AN EX PARTE CONVERSATION WITH ONE OF DEFENDANT'S YOUNG LOCAL ATTORNEYS CONCERNING THE SCHEDULING OF AN EXPEDITED HEARING:

Plaintiffs' attorneys filed a Motion for Sanctions for Discovery Abuse Relating to the GM Privilege Logs Required by the Court's Discovery Order of October 27, 1993 on December 8, 1993.

Plaintiffs' counsel called my secretary, Ms. Darlene Hopper, and requested that an expedited hearing be scheduled as soon as possible since the Plaintiffs' Motion for Sanctions concerned the very same issues that had been involved in prior Motions to Compel Responses to Interrogatories and Document Production and discovery disputes previously heard by this Court in September and October, 1993. After consulting with me, Ms. Hopper set the motion hearing for Friday, December 10, 1993 at 9:30 a.m. Ms. Hopper informed Plaintiffs' attorney and Defendant's counsel advising them of the hearing.

Subsequently, Mr. Joel H. Smith, one of the attorneys representing the Defendant called Ms. Hopper or one of my law clerks on the telephone and requested to speak to me.

My recollection of a conversation and that of Mr.

Smith's is vastly different. Having been a friend of Mr. Smith's deceased father, I inquired about Mr. Smith's unprecedented hostility and intemperate tone,[2] to which Mr. Smith responded that this was a very important case, the most important case he had ever had, and that his career depended on this case and its outcome. I reminded Mr. Smith of how, when he had brought his ten (10) year old daughter to my courtroom several months before, I had stopped proceedings, given her a personal guided tour of the court house, and then presented her with a United States Marshal's badge.

I recall no efforts by Mr. Joel H. Smith at conciliation, but only a hostile and aggressive demand that this Court cancel the hearing. I never made the statement that Mr. Smith's law firm needed to "get on the right track" in this case, or stated that "someone is going to pay," nor did I make the statement, "It's the whole law firm." I do recall and the record reflects that this is precisely what I said to both plaintiffs' counsel and defendant's counsel during the course of the September 20, 1993 hearing. I ruled with respect to interrogatories "... *it is going to cost somebody* (emphasis added) a hundred dollars per interrogatory. I am tired of just putting up with hearings every time this court house door is open. Nobody is answering interrogatories anymore. *So it is going to cost.* (emphasis added). If you're wrong on them, a hundred dollars per interrogatory." [9-20-93 Hearing Transcript, p. 3, l. 7-13].

I refused to accede to Mr. Smith's strident demand that the expedited hearing be rescheduled.

The hearing held on Friday, December 10, 1993 involved expedited ongoing discovery disputes in this case and the Plaintiffs' Motion for Sanctions. However, no Order was issued with respect to the issues dealt with in that hearing until

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[2] Mr. Smith's excitable and hostile nature was again demonstrated when the Court took a ten minute recess so that Mr. Smith could compose himself and collect his emotions and thoughts. (Transcript of hearing December 17, 1993, page 82).

January 10, 1994.

When I ordered the Defendant to produce crash test results, I also advised both Plaintiffs and the Defendant: "Produce them within 48 hours and if the Court decides after the production that they were withheld unnecessarily or unreasonably, it will be a one hundred dollar fine. If the request from the Plaintiff appears to be unreasonable in view of what you have told the Court, then the Plaintiffs will pay a one hundred dollar fine." [9-20-93 Hearing Transcript, p. 10, l. 7-13].

At page ten (10) of Defendant's Memorandum in Support of the Motion to Recuse and Vacate Orders, Defendant by innuendo attempts to impugn the integrity of this Court by stating "in a footnote" their "reason to believe" that the scheduling of the December 10, 1993 hearing had been discussed with Plaintiffs' counsel by the Court prior to December 8, 1993.

Again, no "objectively reasonable inquiry" was made by Defendant's counsel prior to making this allegation. The Affidavit of Lee Tarte clearly explains her cancellation of a discovery conference and dispels Defendant's "hint" of *ex parte* communication between Plaintiffs' counsel and this Court.

The only ex parte contact by either party has been made by Defendant's attorney, Joel H. Smith.

The only sanction issued against either party has been against the Plaintiffs.

5. SCHEDULING AN EXPEDITED HEARING AND REFUSAL TO ALLOW DEFENDANT'S ATTORNEYS SUFFICIENT TIME TO RESPOND TO PLAINTIFFS' MOTION FOR SANCTIONS BASED ON DEFENDANT'S FAILURE TO COMPLY WITH PRIOR COURT ORDERS:

At the very beginning of the hearing I allowed Mr. Joel H. Smith to file and rely on "Fax" copies of affidavits based on his representation that he had been unable to obtain originals. These were affidavits supporting the Defendant's claims of attorney-client privilege with respect to certain documents.

I further ruled that although Mr. Smith's motion to extend the time for the hearing was denied, that "If there's anything that requires additional time, though, and I think you need it, I'll be glad to grant it." [12-10-93 Hearing Transcript, p. 4, 1. 19-25].

After a lengthy hearing, I ruled that the Motion for Sanctions was held in abeyance. [12-10-93 Hearing Transcript, p. 101, 1. 11-12].

Defendant argues that this Court should be disqualified because of personal bias against its attorneys and cites In re Beard, 811 F.2d 818, 830 (4th Cir. 1987). In that case, Circuit Judge Widener, writing for the panel (composed of additional Judges Russell and Chapman) held:

> Belatedly, petitioners claim that at one of these ex parte meetings Judge Merhige called Attorney Bradley Post a "son-of-a-bitch" and a "wise-ass" lawyer, thus showing the Judge's bias against Mr. Post. Bias against an attorney is not enough to require disqualification under § 455 unless Petitioners can show that such a controversy would demonstrate a bias against the party itself. (citations omitted); for the bias against the attorney to require disqualification of the

trial judge, it must be of a continuing and personal nature and not simply bias against the attorney because of his conduct. (citation omitted). Antipathy to an attorney is insufficient grounds for disqualification of the judge. (citation omitted). While the district court's comments were ill-advised, those remarks alone do not require disqualification. *In re Beard, supra*, at 817-818.

The scheduling of the expedited hearing for December 10, 1993, does not show a bias "of a continuing and personal nature" so as to require recusal under 28 U.S.C. § 455.

6. THE COURT'S RULE TO SHOW CAUSE PURSUANT TO RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Defense attorneys argue that the Court's Rule 11 inquiry filed on January 28, 1994 further evidences bias "as a continuing and personal nature" since it was filed despite the mandates of 28 U.S.C. § 144. However, the Motion for Recusal was filed on January 18, 1994. The Memorandum accompanying the motion contains extremely serious and unsupported allegations. The motion, as originally filed, clearly failed to meet the legal requirements of 28 U.S.C. § 144. The motion was filed with two affidavits by local defense counsel, neither of which asserted any personal bias or prejudice as to the party defendant. Nor was the recusal motion and supporting memorandum accompanied at filing by the statutorily mandated Certificate of Good Faith of Counsel.

Only after the Court's notice of Rule 11 inquiry did local defense counsel attempt to rectify the deficiencies in the filing under 28 U.S.C. § 144 by filing a Certificate of Good Faith of defense counsel attached to its Reply Memorandum on February 3, 1994. The Certificate of Counsel was and remains deficient. It was never filed with the affidavit of a party, only certifies that the Affidavits accompanying the Motion, i.e., those of Mr. Morrison, Mr. Smith, and Ms. Quintana were filed

in good faith. The Certificate also fails to allege that the attorney believes the facts asserted in any affidavit to be true. No mention of good faith is asserted as to the fourth Affidavit of General Motors' staff lawyer, Susan E. Mason, filed on January 21, 1994.

> RULE 11. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS. (a) SIGNATURE. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party. (b) REPRESENTATIONS TO COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,— (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the details of factual

contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Under Rule 11, the signature of a party or attorney constitutes a certificate that the signer believes that after reasonable inquiry, 1) the pleading or motion is well grounded in fact; 2) the pleading or motion is warranted by existing law; and 3) the pleading or motion is not presented for any improper purpose. *Perkins v. General Motors Corporation*, 129 F.R.D. 655, 658, *aff'd*, 965 F.2d 597 (8th Cir. 1992).

The attorney need not even act in subjective bad faith or with malice to trigger a violation of Rule 11. *Adduono v. World Hockey Ass'n*, 824 F.2d 617, 621 (8th Cir. 1987).

Rather, an objective standard applies and the party or his attorney cannot argue "that their subjective 'good faith' (i.e., ignorance of the law or legal procedures) somehow excuses their actions. *Kurkowski v. Volcker*, 819 F.2d 201, 204 (8th Cir. 1987).

Rule 11 "was designed to prevent abuse caused not only by bad faith but by negligence and, to some extent, by professional incompetence." *Gaiardo v. Ethyl Corporation*, 835 F.2d 479, 482 (3rd Cir. 1987). See Rule 11 Advisory Committee Note, 97 R.F.D. at 198.

As stated by another district court judge: A motion to recuse a judge is not just another procedural or evidentiary motion. It is a direct attack on one of the basic principles of our judicial system, the impartiality of the trial court.... But the obligations which respondents owed to their clients does not answer the dilemma. It merely states the dilemma. The other side of the dilemma is that defense attorneys are also officers of the court and owe duties, to the administration of justice. In re Order to Show Cause, 741 F.Supp. 1379, 1381 (N.D.Cal. 1990).

Two federal cases concerning false accusations against judges have arisen from civil cases and involved Rule 11. In

In re Kelly, 808 F.2d 549 (7th Cir. 1986), the appellate court defined the duties of counsel to require the making of inquiry and further required attorneys to be scrupulous regarding the accuracy of their statements. Another case, *Mair v. Orr*, 758 F.2d 1578 (Fed.Cir. 1985), defined the duty in terms of reasonable inquiry.

Rule 11 demands that an attorney conduct an "objectively reasonable investigation" of the facts supporting a claim before it is filed. *Cleveland Demolition Company, Inc. v. Azcon Scrap. Corporation*, 827 F.2d 984, 987 (4th Cir. 1987). The proper inquiry is whether "a reasonable attorney in like circumstances would believe his actions to be factually and legally justified." *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987). Counsel cannot have held this belief.

The counsel of record in these cases have fallen far short of the requirements of their ethical and professional responsibilities. A reasonable inquiry was not made into the facts asserted in the Motion to Recuse and the Affidavits nor were counsel scrupulous regarding the accuracy of their statements in the supporting memorandum as evidenced by the record in this matter.

The fact that a judge *sua sponte* issues a Rule to Show Cause pursuant to Rule 11(c)(1)(B) of the Federal Rules of Civil Procedure indicates no bias requiring his disqualification. *Lemaster v. United States*, 891 F.2d 115, 120-121 (6th Cir. 1989). Clearly, this is a judge's duty and responsibility.

Additionally, the recusal motion was untimely. Defense counsel has fully participated without objection in three (3) hearings on December 10, 1994, December 17, 1994, and December 22, 1994, and only filed its Motion for Recusal on January 18, 1994.

III. DEFENDANT'S MOTION TO VACATE THIS COURT'S ORDERS DATED DECEMBER 30, 1993.

Defendant has filed a Motion (1) for an Order Recusing the Court in this case pursuant to 28 U.S.C. § 144 and 28 U.S.C. § 455(a), and (2) for an Order Vacating this Court's Orders based on hearings on December 10, December 17, and December 30, 1993.

As noted above, grounds alleged are: (1) exposure to alleged extended ex parte arguments during a legal education seminar by attorneys representing Plaintiffs in this case regarding issues to be heard the following week; (2) a public attack on the veracity and integrity of automobile tort defendants, defense attorneys, and praise for plaintiffs' attorneys and pro-plaintiff product liability decisions; and (3) denial of time for Defendant's counsel to respond to a Motion for Sanctions filed by Plaintiffs relating to ongoing discovery abuse by the Defendant. Defendant relies on this third ground in support of its Motion to Vacate Orders, specifically, the five (5) Orders of this Court relating to hearings held on December 10, 1993, December 17, 1993, and December 22, 1993, one of which Orders required the Defendant to produce fifteen (15) documents and one "partial" document from the Defendant's "Privilege Log," which had been submitted for in camera review, from the twenty-three (23) documents for which attorney-client privilege was claimed. All five (5) Orders are, in fact, dated December 30, 1993.

It should be noted that on December 21, 1993, defense counsel had still failed to comply with the Court's Order of October 1993 that designated documents from the Legal Files Privilege Log be submitted to the Court for *in camera* review. The designation of these documents was Exhibit C to the Plaintiff's Motion heard on December 10, 1993. To my utter amazement, defense counsel asserted that he had not realized that the Court wished these documents submitted. The Court instructed Defendant's attorneys to produce these documents

for an in camera review by the next day and to produce a privilege log on other documents on which counsel was asserting an attorney-client privilege. Again, Defendant fully participated in this hearing, made no objection to the Court's review, and gave no notice of Defendant's desire for the Court's recusal.

A review of these documents submitted on December 22, 1993 supports the Plaintiffs' position of possible document destruction and perjury as argued on several previous hearings. [Submitted as part of the record to the Fourth Circuit without objection by Defendant from the hearing held January 25, 1994.].

A review of the thousands of documents in this case including *in camera* reviews of documents for which an attorney-client privilege was asserted reveals a substantial likelihood that perhaps perjury and the systematic destruction of documents involving gross misconduct by General Motors' regional counsel occurred. Evidence of the commission of such activity by and with the knowledge of these General Motors' regional counsel would defeat the attorney-client and work-product privilege asserted by General Motors. There is clearly evidence having a sufficient foundation in fact to establish a prima facie case that the documents for which an attorney-client privilege is asserted are subject to the crime-fraud exception.

With respect to my Order referring to the hearings held on December 17 and December 21, 1993, following the earlier hearing on December 10, 1993, the Court allowed Plaintiffs' counsel to take the depositions of certain outside regional counsel and General Motors' employees concerning the "document sweep" and the systematic destruction of documents.

As noted, Exhibit F to the July 21, 1993 Brief in Support of Plaintiff's First Motion to Compel General Motors to Respond to Plaintiffs' First Document Requests and First Interrogatories is a portion of the deposition of an assistant

staff engineer for General Motors, Mr. Kashmerick. His testimony is clear that General Motors' Legal Department "went through all my file cabinets and took every damn thing they thought was a problem." [Kashmerick deposition, p. 23, 1. 22--p. 24, 1. 11]. When asked about participants in the "document sweep", Mr. Kashmerick identified the General Motors' legal staff. [Kashmerick deposition, p. 29, 1. 8--p. 30, 1. 4]. Mr. Kashmerick was asked about contact with General Motors' legal staff and documents. He stated: "Yeah. I gave them to the legal staff through these people that worked in their department." [Kashmerick deposition, p. 31, 1. 14-20]. Mr. Kashmerick further stated: "Those papers were all put in a great big trash bin right outside my office in the hallway and the guy was given strict instructions by the legal people. Take them downstairs and put those in the shredder and we're going to take these with us. They had two briefcases full. These wide briefcases. They had two briefcases full of papers that they took and they were going to look over more carefully." [Kashmerick deposition, p. 34, 1. 11-25].

Defense counsel submitted a Brief in Support of the Motion for Affidavit of Privileges. Additionally, General Motors' defense counsel, Mr. Joel H. Smith, was given the opportunity at the hearing on December 17, 1993, to respond to Plaintiffs' Motion to Take the Depositions of General Motors' Outside Regional Counsel involved in the "Document Sweep" and possible document destruction. [12-17-93 Hearing Transcript, p. 60, 1. 7-19].

Defense counsel have defended the attorney-client privilege by submitting affidavits from former regional attorneys who were alleged to know about the "document sweep" and document destruction. Argument was heard from Mr. Smith who was given an additional four (4) days to further supplement his position and defend his assertion of the claimed asserted attorney-client privilege as to documents and the depositions of outside regional counsel and employees.

CONCLUSION

The Court has reviewed the cases cited by the Defendant in support of the Motion to Recuse and to Vacate Orders and finds them to be easily distinguishable from the current case.

For example, in In re: School Asbestos Litigation, 977 F.2d 764, amended, 24 Fed.Rules Serv.3d 39 (3rd Cir. 1992), the judge attended a conference sponsored by the plaintiffs on a key merits issue and the conference was indirectly funded with court approved funds. The judge's expenses were largely defrayed by conference sponsors with those same court approved funds. Judge Kelly himself stated that he had been exposed to a Hollywood-style "pre- screening" of the plaintiffs' case and thirteen of eighteen experts retained by plaintiffs who were to testify at trial gave presentations reflecting their expected testimony. None of these facts exist in this case.

With respect to *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993), also relied upon by General Motors, the court states: "The statute (28 U.S.C. § 455(a)) is not intended to give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice." *Id.* at 993. In ruling on whether or not the district judge abused his discretion by denying defendants' Motion to Recuse under 28 U.S.C. § 455(a), the district judge's denial of the defendants' motion was upheld on every ground but one—the judge's appearance on and statements on the national network news program "Nightline". The concern of the Tenth Circuit was the judge's expressive conduct in choosing "to appear in such a forum at a sensitive time to deliver strong views on matters which were likely to be ongoing before him." *Id.* at 995. In the current circumstance, I did not appear in the national media. I did not "deliver strong views" on matters that were before me. My presentation addressed the admission into evidence of video animation and two (2) recent United States Supreme Court decisions, one relating to expert opinion and one relating to the

constitutionality of punitive damages. I expressed no views on any issue soon to be before me, i.e., discovery abuse, or any opinion on automobile design litigation.

The other cases cited by Defendant I also find inapplicable.

I FIND AS FACT THE FOLLOWING:

I find as a matter of fact the following:

(1) I find as a matter of fact that I did not hear the presentation by Mr. James Butler on Friday, December 3, 1993 from 9:45 a.m. to 10:30 a.m. entitled "The Facts Behind the $100M Verdict."

(2) I find as a matter of fact that I was not present for the presentation by Mr. J. Kendall Few from 4:45 p.m. to 5:30 p.m. on Friday, December 3, 1993, although I did return to the conference shortly before 5:30 p.m. to attend a social event and I did enter the Seminar Room as Mr. Few completed his speech. I heard nothing which even remotely related to the case *sub judice.*

(3) I find as a matter of fact that I was not subjected to an ex parte "preview" or "pre-screening" of important issues to be considered by me in subsequent hearings.

(4) I find as a matter of fact that there were five (5) members of the Defendant's South Carolina law firm in the audience, one of whom, Ms. Diedre Shelton, has actively participated in this case.

(5) I find as a matter of fact that following the SCTLA Seminar, Defendant fully participated in three (3) hearings on discovery abuse motions, one on December 10, 1993, a second hearing on December 17, 1993, and also on December 21, 1993. Plaintiffs made no objection nor advised the Court that Defendant planned to file its Motion to Recuse despite the fact that its attorneys had been in attendance at the SCTLA Seminar on December 3, 1993 and would have known then what was subsequently asserted as the basis for General

Motors' Motion to Recuse which was not filed until January 18, 1994.

(6) I find as a matter of fact that the Motion was untimely.

(7) I find as a matter of fact that I did not attend a predominately pro- plaintiff conference on any key merits issue.

(8) I find as a matter of fact that I was not the "honored guest" at the SCTLA Seminar and that I paid all of my own expenses with the exception of my hotel room, which I believe is paid for by the Association for all speakers.

(9) I find as a matter of fact that I was not exposed to a "pre-screening" of the Plaintiff's case or to facts pertaining to "key merits issues".

(10) I find as a matter of fact that there were no ex parte communications by Plaintiffs' attorneys with this Court. The only ex parte communication was by Defendant's attorney, Joel H. Smith.

(11) I find as a matter of fact that there is and has been no personal bias or prejudice expressed or implied as to the Party Defendant General Motors.[3]

(12) I find as a matter of fact that there is and has been no personal bias or prejudice, expressed or implied, of a continuing and personal nature as to the Defendant's attorneys.

(13) I further find as a matter of fact that although Defendant's Motion to Recuse is only based on 28 U.S.C.

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[3] In 1977 I successfully represented Thomas Murphy, Chairman of the Board and CEO of General Motors who had been noticed to testify in a case involving the alleged switching of vehicle engines of a Chevrolet engine to an Oldsmobile. See S.C. Court Docket No. 77-CP-04-273.

§ 455(a), that no alleged personal bias derived from an extra-judicial source, or otherwise, exists as to either the Defendant or Defendant's attorneys.

(14) I find as a matter of fact that the Court's sua sponte Notice of Rule 11 Inquiry demonstrates no personal bias or prejudice as to defense counsel. Defense attorneys filed a Motion for Recusal on January 18, 1994 asserting 28 U.S.C. § 144 and 28 U.S.C. § 455(a). The Motion for Recusal and the accompanying Memorandum made extremely serious and untrue allegations accompanied by innuendo and unsupported statements made without inquiry reasonable under the circumstances. The Motion under 28 U.S.C. § 144 as filed was legally insufficient as well as untimely. The Motion was not filed accompanied by the affidavit of a party, but rather with two (2) affidavits of local defense counsel, neither of which asserted any bias or prejudice as to the Defendant. Nor was the Motion accompanied at filing by the required Certificate of Good Faith by Local Counsel asserting that he believed the facts alleged to be true. As originally filed, and as it existed at the time of this Court's Rule 11 Notice, that Motion clearly did not meet the requirements of 28 U.S.C. § 144. The deficiencies in the recusal motion remain uncorrected to this day in spite of belated efforts by counsel to rectify its shortcomings.

(15) I further find as a matter of fact that the tenets of the Judicial Code of Ethics were not violated by this Court.

CONCLUSIONS OF LAW

Defendant General Motors asserts its Motion for Recusal under 28 U.S.C. § 455(a) as the basis for its Motion for Recusal. 28 U.S.C. § 455(a) states the following: (a) Any ... judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Although not asserted as a ground for recusal by Defendant in its Motion, 28 U.S.C. § 455(b) states: (b) He shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party,

or personal knowledge of disputed evidentiary facts concerning the proceeding; ....

Disqualification is only required if a reasonable factual basis exists for doubting the judge's impartiality. *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978).

In determining whether a district judge is to be disqualified under 28 U.S.C. § 455(a), which requires a judge to recuse himself "in any proceeding in which his impartiality might be questioned," the issue is whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal is sought would entertain significant doubt that justice would be done in the case. *Union Carbide Corporation v. U.S. Cutting Services, Inc.*, 782 F.2d 710 (7th Cir. 1986); *U.S. v. Louhelia*, 454 F.2d 811 (2nd Cir. 1992); *Parker v. Connors Steel Company*, 855 F.2d 1510 (11th Cir. 1988), *rehearing denied*, 864 F.2d 795, *cert. denied*, 109 S.Ct. 2066, 490 U.S. 1066, 104 L.Ed.2d 631 (1989).

Additionally, a judge's impartiality must be judged, for recusal purposes, from the prospective of a reasonable, uninvolved observer, in light of the full record, and not simply in light of an isolated incident. *In re: Wirebound Boxes Anti-Trust Litigation*, 724 F.Supp. 684 (D.Minn. 1989).

In determining whether to disqualify himself on grounds of, among other things, that his impartiality might reasonably be questioned, a judge is to take into consideration all of the circumstances, both those in public and hidden view, and determine if a reasonable uninvolved observer would determine that his partiality might be questioned, and in making such an assessment the judge is not limited to those facts presented by the challenging party as he would be in a motion under 28 U.S.C. § 144, i.e., disqualification by way of a legally sufficient affidavit asserting personal bias or prejudice, nor must the judge accept any of the asserted facts as true. *State of Idaho v. Freeman*, 507 F.Supp. 706 (D.C.Idaho 1981); *Phillips v. Joint Legislature Com., etc.*, 637 F.2d 1014, 1019 n. 6 (5th Cir. 1981), *cert. denied*, 456 U.S.

960, 971, 102 S.Ct. 2035, 2233, 72 L.Ed.2d 483, 845 (1982); *In re Beard*, 811 F.2d 818, 827 (4th Cir. 1982).

While I can discern little direct charge of personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts, and although the Defendant's motion is made pursuant to 28 U.S.C. § 455(a), I will, from an abundance of precaution, also address 28 U.S.C. § 455(b).

"The alleged (personal) bias or prejudice (concerning a party), must derive from an extra-judicial source. It must result in an opinion on the merits on a basis other than that learned by the judge from his participation in the case before him. *United States v. Grinnell Corporation*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966). The nature of the judge's bias must be personal and not judicial. *Shaw v. Martin*, 733 F.2d 304, 308 (4th Cir. 1984). A judge is not disqualified because his familiarity with the facts of a case stem from his judicial conduct in presiding over earlier proceedings. *United States v. Parker*, 742 F.2d 127 (4th Cir. 1984)." *In re Beard*, 811 F.2d 818, 827 (4th Cir. 1987).

AS A MATTER OF LAW I FIND THE FOLLOWING:

1. I find as a matter of law that Defendant's Motion is premised on 28 U.S.C. § 455(a), although Defendant's Memorandum and Reply Memorandum in Support of its Motion to Recuse and Vacate Orders argues and cites 28 U.S.C. § 455(b).

2. I find as a matter of law that I was not exposed to any ex parte evidence or argument by Plaintiffs at the South Carolina Trial Lawyers Association Conference with any resulting bias or prejudice as to a party.

3. I find as a matter of law that my remarks in the course of my continuing legal education presentation at the Conference demonstrate no personal bias or prejudice against the Defendant, General Motors (as would be mandated by 28 U.S.C. § 455(b).

4. I find as a matter of law that my Order for an expedited hearing pursuant to Plaintiff's Motion for Sanctions relative to allegations of ongoing and continuous discovery abuse by the Defendant also demonstrates no personal bias or prejudice against the Defendant or Defendant's counsel. I point out that I allowed defense counsel to file and rely on "fax" affidavits, and advised defense counsel that additional time to respond would be granted if needed. I also point out that no sanctions were implemented and that I placed Plaintiffs' Motion for Sanctions against the Defendant in abeyance.

5. I find as a matter of law that this Court has no bias against any attorney or defense counsel to require disqualification; I further find that there is no bias against any attorney or defense counsel of a continuing and personal nature.

6. I find as a matter of law that the scheduling of an expedited hearing is not sufficient to establish grounds for recusal. Scheduling is within the realm of judicial case management which is left to the discretion of the trial court and which does not provide a basis for recusal. *Johnson v. Trueblood*, 629 F.2d 287, 291 (3rd Cir. 1980), *cert. denied*, 450 U.S. 999, 101 S.Ct. 1704, 68 L.Ed.2d 200 (1981).

7. I find as a matter of law that the implementation of Rule 11 inquiry by the Court filed on January 28, 1994, demonstrates no bias against Defendant General Motors or any bias as to defense attorneys of a continuing personal nature *and not* simply bias against an attorney because of his conduct. *In re Beard, supra*, at 830. Defendant's attorneys filed and served a Motion for Recusal relying on 28 U.S.C. § 144 and 28 U.S.C. § 455(a). The Motion for Recusal under 28 U.S.C. § 144, which was filed on January 18, 1994, was defective in that it was not accompanied by the affidavit of a party, nor was the Motion filed accompanied by a Certificate of Good Faith by local defense counsel.

8. I further find that Canons 3.C and 4.A of the Code of Judicial Conduct were not violated by this Court.

9. I find as a matter of law that the Order and Rule to Show Cause pursuant to Rule 11(c)(1)(b) of the Federal Rules of Civil Procedure issued to Joel H. Smith and Stephen G. Morrison shall be provided to the Clerk of the Federal Court for transfer to another federal judge.

10. Public confidence in the impartiality and fairness of the judiciary must forever remain inviolate. This concept transcends all other considerations. Therefore, I find that a reasonable person could possibly view my mere appearance on the same legal education program with Mr. Butler and Mr. Few, Attorneys for Plaintiffs in a case pending before me, as compromising the fairness and impartiality of the Presiding Judge. Now, therefore, for this reason only, and further out of a super abundance of caution, I hereby recuse myself from further participation in these cases. The Orders resulting from hearings on December 10, 17, and 21, 1993 are vacated (a total of five (5) Orders dated December 30, 1993), but the Rule 11 Motion dated January 28, 1994, directed to Mr. Stephen G. Morrison and Mr. Joel H. Smith for Rule 11 sanctions remains in full force and effect and is to be heard by the judge to whom this case is next assigned.

IT IS SO ORDERED.